

2021 – 2049; 2024 – 1084; 2024 – 1159

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PAUL E. ARLTON AND DAVID J. ARLTON,

Plaintiffs-Appellants

v.

AEROVIRONMENT, INC.,

Defendant-Cross-Appellant

Appeals from the United States District Court for the
Central District of California in
Case No. 2:20-cv-07438-AB-GJS, Judge Andre Birotte, Jr.

**CORRECTED, DEFENDANT-CROSS-APPELLANT
AEROVIRONMENT'S
PRINCIPAL AND RESPONSE BRIEF**

Dated: September 17, 2024

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U.S. Patent No. 8,042,763

Claim 1

1. A rotary wing aircraft comprising
 - a non-rotating structural backbone,
 - a first rotor system coupled to the non-rotating structural backbone including first variable pitch rotor blades supported by a first rotor shaft for rotation about an axis of rotation in a first rotor plane and controlled by a first blade pitch controller which includes cyclic pitch control,
 - a second rotor system coupled to the non-rotating structural backbone including second variable pitch rotor blades supported by a second rotor shaft for rotation about the axis of rotation in a second rotor plane and controlled by a second blade pitch controller which includes cyclic pitch control, the second rotor plane being positioned to lie in axially spaced apart relation to the first rotor plane along the axis of rotation,wherein the first blade pitch controller is coupled to the nonrotating structural backbone so that neither the first rotor shaft nor the second rotor shaft extends through the first blade pitch controller.

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 21-2049; 24-1084; 24-1159

Short Case Caption Arlton v. Aerovironment, Inc.

Filing Party/Entity AeroVironment, Inc.

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<p>AeroVironment, Inc.</p>		<p>BlackRock, Inc.</p>
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TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF THE ISSUES.....	2
STATEMENT OF RELATED CASES	3
STATEMENT OF JURISDICTION.....	3
STATEMENT OF THE CASE AND FACTUAL BACKGROUND	4
SUMMARY OF THE ARGUMENT	15
STANDARD OF REVIEW	19
ARGUMENT	19
I. The District Court Correctly Granted Summary Judgment In AeroVironment’s Favor.	19
A. Section 1498 Provides a Contractor with Broad Immunity Against Patent Infringement.	21
B. The Undisputed Record Shows That the Government Assumed Liability for AeroVironment’s Work on the Mars Helicopter Program Under 28 U.S.C. § 1498.	23
C. The SBIR Statute Does Not Defeat AeroVironment’s Section 1498 Immunity.	27
D. Section 1498 Covers AeroVironment’s Manufacture and Use of Terry.	39
II. The District Court Did Not Abuse Its Discretion In Denying the Arltons’ Belated Motion To Amend.	47
III. The District Court Abused Its Discretion In Declining To Award Fees.....	49
A. 35 U.S.C. § 285 Permits an Award of Fees to Deter Frivolous Patent Litigation and to Compensate Litigants Harmed by Such Litigation.	51
B. AeroVironment is Entitled to its Reasonable Attorneys’ Fees Under 35 U.S.C. § 285 and/or the Court’s Inherent Sanction Power.	53
C. The District Court’s Decision to Deny an Award of Fees Was an Abuse of Discretion.....	61
D. Amount of Fees	66
CONCLUSION.....	66

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>AdjustaCam, LLC v. Newegg, Inc.</i> , 861 F.3d 1353 (Fed. Cir. 2017)	<i>passim</i>
<i>Advanced Software Design Corp. v. Federal Reserve Bank of St. Louis</i> , 583 F.3d 1371 (Fed. Cir. 2009)	38, 61
<i>Arlton v. AeroVironment, Inc.</i> , No. 2:20cv7438 (C.D. Cal. Mar. 17, 2021)	<i>passim</i>
<i>Astornet Techs., Inc. v. BAE Sys., Inc.</i> , 201 F. Supp. 3d 721 (D. Md. 2016).....	55
<i>Astornet Techs. Inc. v. BAE Sys., Inc.</i> , 802 F.3d 1271 (Fed. Cir. 2015)	<i>passim</i>
<i>ATK Thiokol, Inc. v. United States</i> , 598 F.3d 1329 (Fed. Cir. 2010)	42
<i>Auerbach v. Sverdrup Corp.</i> , 829 F.2d 175 (D.C. Cir. 1987).....	23, 26
<i>BAE Sys. Info. & Elec. Sys. Integration Inc. v. Aeroflex Inc.</i> , No. 09-cv-769, 2011 WL 3474344 (D. Del. Aug. 2, 2011)	44
<i>Bayer CropScience AG v. Dow AgroSciences LLC</i> , 851 F.3d 1302 (Fed. Cir. 2017)	61
<i>Blue & Gold Fleet, L.P. v. United States</i> , 492 F.3d 1308 (Fed. Cir. 2007)	29
<i>Eltech Sys. Corp. v. PPG Indus., Inc.</i> , 903 F.2d 805 (Fed. Cir. 1990)	65
<i>Erickson Air Crane Co. of Wash. v. United States</i> , 731 F.2d 810 (Fed. Cir. 1984)	28

Gabriel Techs. Corp. v. Qualcomm Inc.,
560 F. App’x 966 (Fed. Cir. 2014)55

Homeland Housewares, LLC v. Sorensen Rsch. & Dev. Tr.,
581 F. App’x. 877 (Fed. Cir. 2014)62

Hughes Aircraft Co. v. United States,
534 F.2d 889 (Ct. Cl. 1976)23, 26

IRIS Corp. v. Japan Airlines Corp.,
769 F.3d 1359 (Fed. Cir. 2014)43

Johnson v. Mammoth Recreations, Inc.,
975 F.2d 604 (9th Cir. 1992)47

Kilopass Tech., Inc. v. Sidense Corp.,
82 F. Supp. 3d 1154 (N.D. Cal. 2015)52, 53

Lite Machines Corp. v. United States,
143 Fed. Cl. 267 (2019)*passim*

Lite Machines Corporation, et al. v. United States,
No. 18-1411C30, 34

Madey v. Duke Univ.,
413 F.Supp.2d 601 (M.D.N.C. 2006)23, 24, 25

MarcTec, LLC v. Johnson & Johnson,
664 F.3d 907 (Fed. Cir. 2012)55

Nat’l Merch. Ctr., Inc. v. MediaNet Grp. Techs., Inc.,
893 F. Supp. 2d 1054 (C.D. Cal. 2012)53

Net MoneyIN, Inc. v. VeriSign, Inc.,
545 F.3d 1359 (Fed. Cir. 2008)19

Night Vision Corp. v. United States,
469 F.3d 1369 (Fed. Cir. 2006)16, 34, 35

Night Vision Corp. v. United States,
68 Fed. Cl. 368 (2005)34

Octane Fitness, LLC v. ICON Health & Fitness, Inc.,
572 U.S. 545 (2014).....52, 62

Orion Tech., Inc. v. United States,
704 F.3d 1344 (Fed. Cir. 2013)29

PDS Consultants, Inc. v. United States,
907 F.3d 1345 (Fed. Cir. 2018)36, 37

Radiation Sys., Inc.,
B-244561, Oct. 16, 1991, 91-2 CPD ¶ 342.....29

Raymond Eng’g Inc. v. Miltope Corp.,
No. 85 Civ. 2685 (RWS), 1986 WL 488 (S.D.N.Y. May 23, 1986)45

Res. Conservation Grp., LLC v. United States,
597 F.3d 1238 (Fed. Cir. 2010)28

Richmond Screw Anchor Co. v. United States,
275 U.S. 331 (1928).....*passim*

Robishaw Eng’g, Inc. v. United States,
891 F. Supp. 1134 (E.D. Va. 1995)11

Rothschild Connected Devices Innovations, LLC v. Guardian Prot. Servs., Inc.,
858 F.3d 1383 (Fed. Cir. 2017)53, 61, 65

Saint-Gobain Ceramics & Plastics, Inc. v. II-VI Inc.,
369 F. Supp. 3d 963 (C.D. Cal. 2019)43, 44

Salvin v. Am. Nat. Ins. Co.,
281 F. App’x 222 (4th Cir. 2008)58

Sevenson Env’t Servs., Inc. v. Shaw Env’t, Inc.,
477 F.3d 1361 (Fed. Cir. 2007)20, 43

Toxgon Corp. v. BNFL, Inc.,
312 F.3d 1379 (Fed. Cir. 2002)19

Tresona Multimedia, LLC v. Burbank High Sch. Vocal Music Ass’n,
953 F.3d 638 (9th Cir. 2020)53, 61

TVI Energy Corp. v. Blane,
806 F.2d 1057 (Fed. Cir. 1986)22, 41, 49

Universal Elecs., Inc. v. Universal Remote Control, Inc.,
130 F. Supp. 3d 1331 (C.D. Cal. 2015)51

Zoltek Corp. v. United States,
672 F.3d 1309 (Fed. Cir. 2012)22, 38

Zoltek Corp. v. United States,
85 Fed. Cl. 409 (2009)49

Statutes

28 U.S.C.A. § 1491(a)28

15 U.S.C. § 638(r)(3) (2012)37

28 U.S.C. § 1491(b)(1).....28

28 U.S.C. § 149856

28 U.S.C § 1498(a)*passim*

35 U.S.C. §§ 200-21232

35 U.S.C. § 28551

Other Authorities

37 C.F.R. § 401.1432

48 C.F.R. § 1.2025

48 C.F.R. § 27.2015

48 C.F.R. § 27.201-2(a)(2).....25

48 C.F.R. § 52.227*passim*

F.R.A.P. 4(b)(ii)4

FAR 31.205-18.....42

Fed. R. Civ. P. 16(b)47

INTRODUCTION

The Arltons believe that their patent rights “were taken by the Government.” Op. Br. at 2. The remedy for this taking, however, is only available “by action against the United States in the United States Court of Federal Claims for the recovery of...reasonable and entire compensation for such use and manufacture” under 28 U.S.C § 1498(a). Section 1498 operates as a limited waiver of sovereign immunity, providing patentees with a mechanism to pursue recompense for the United States’ use of their patented technology. In turn, Section 1498 immunizes any Government contractor whose use of patented technology is “for the Government and with the authorization or consent of the Government.” 28 U.S.C § 1498(a).

Because the operating contract for NASA’s Jet Propulsion Laboratory (“JPL”) is publicly available, the Arltons could have verified, before filing their Complaint, that AeroVironment’s allegedly infringing conduct was not only undertaken for the Government (a point the Arltons now concede), but also that AeroVironment operated with the Government’s express authorization and consent. Insofar as these are the *only* requirements for Section 1498 to shield AeroVironment from the Arltons’ infringement allegations, even the most cursory pre-suit investigation would have revealed that the Arltons had both the wrong defendant and the wrong court for their claims.

Moreover, although the Arltons have now filed a parallel Section 1498 suit against the United States in the Court of Federal Claims (“COFC”), they have continued to press their misguided suit against AeroVironment. Even after the United States filed a statement of interest, confirming that the United States assumed all liability for any infringement, the Arltons refused to accept that their exclusive statutory remedy was provided by Section 1498. That is because the Arltons do not want “reasonable and entire compensation” for the Government’s taking of their intellectual property. Instead, they want a court “to set the historical record straight” that it was not “AeroVironment’s technology [that] enabled the historic first flight on another planet.” Op. Br. at 52 n.16. They believe that “credit is due [to] the Arlton brothers, not AeroVironment,” and think they can only achieve that objective through their suit against AeroVironment, regardless of Section 1498 immunity. *Id.*

The Arltons’ insistence on prosecuting a meritless suit no matter what Section 1498, the Government, or the Court’s precedent say makes this case exceptional under 35 U.S.C. § 285. AeroVironment respectfully requests that the Court affirm the District Court’s summary judgment ruling and its decision to deny leave to amend, and reverse the District Court’s denial of AeroVironment’s request for attorneys’ fees and costs.

STATEMENT OF THE ISSUES

1. Whether the District Court correctly granted summary judgment of

noninfringement under 28 U.S.C. § 1498.

2. Whether the District Court correctly denied Appellants' untimely motion for leave to amend their Complaint.

3. Whether the District Court abused its discretion in denying AeroVironment's request for attorneys' fees and costs.

STATEMENT OF RELATED CASES

Cross-Appellant AeroVironment, Inc. states that the following appeals could be considered related. In *Lite Machines Corporation, et al. v. United States*, No. 18-1411C (Ct. Clms.), Appellants Paul E. Arlton and David J. Arlton and Lite Machines Corporation have sought to bring claims against the Government for the Mars Helicopter's infringement of U.S. Patent No. 8,042,763B2. Additionally, Lite Machines also has asserted claims for breach of contract and a taking of its SBIR Phase III rights in violation of the Fifth Amendment. Beyond these consolidated appeals, no other appeal in or from the same civil action or proceeding in the originating tribunal was previously before this or any other appellate court. Counsel is unaware of any cases pending in this or any other tribunal that will directly affect or be directly affected by this court's decision in the pending case.

STATEMENT OF JURISDICTION

Defendant-Cross-Appellant AeroVironment, Inc. ("AeroVironment") agrees that this Court has jurisdiction over the Arltons' appeal. The Court also has

jurisdiction over AeroVironment's cross-appeal, which was timely filed on November 9, 2023, within 30 days of the District Court's October 25, 2023 Order denying AeroVironment's Renewed Motion for Attorneys' Fees and Costs. Appx33-39; *see* F.R.A.P. 4(b)(ii).

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

On August 17, 2020, Paul and David Arlton (the "Arltons") filed a patent infringement complaint against AeroVironment alleging that a single product, the Mars Helicopter Ingenuity, infringes United States Patent No. 8,042,763B2 ("the '763 patent"). Appx97, Appx132. Because AeroVironment's work on Ingenuity was both for the Government and with the Government's authorization and consent to patent infringement, however, the Arltons' Complaint was fatally flawed.

AeroVironment's role in the Mars Helicopter program occurred under three subcontracts with NASA's Jet Propulsion Laboratory ("JPL") (the "Ingenuity Subcontracts"). Each of the Ingenuity Subcontracts states that it is "[a] SUBCONTRACT UNDER JPL'S NASA PRIME CONTRACT". Appx138, Appx141, Appx149, Appx156; *see also* Appx132.

JPL, which manages NASA's Mars Exploration Program, is a federally-funded research and development center managed by the California Institute of Technology under a prime contract with NASA (the "JPL Operating Contract"). Appx138-139, Appx161, Appx162. Thus, the reference to "JPL's NASA PRIME

CONTRACT” in the Ingenuity Subcontracts is to the JPL Operating Contract. *See* Appx140-160; *see also* Appx132. The JPL Operating Contract is available on NASA’s website. Appx138 (citing Contract No. NNN12AA01C, available at https://www.hq.nasa.gov/pao/FOIA/jpl/docs/NMO000055_002.PDF).

NASA is an executive branch agency subject to the Federal Acquisition Regulation (“FAR”). 48 C.F.R. § 1.202. As required in “contracts for which the primary purpose is R&D work,” the JPL Operating Contract incorporates FAR 52.227-1, Alternate I, Authorization and Consent. 48 C.F.R. § 27.201-2(a)(2); Appx139, Appx165; *see also* Appx133. This clause provides the Government’s express authorization and consent to any acts of patent infringement that occur in the performance of the contract or any subcontract thereunder, including AeroVironment’s alleged infringement: “The Government authorizes and consents to all use and manufacture of any invention described in and covered by a United States patent in the performance of this contract or any subcontract at any tier.” *See* 48 C.F.R. § 52.227-1, Alternate I (2007); *see also* Appx133.

In accordance with 48 C.F.R. § 52.227-1(b), JPL incorporated the same clause into the Ingenuity Subcontracts. Appx139, Appx142, Appx150, Appx157, Appx166-167, Appx170, Appx171; *see also* Appx133. The Ingenuity Subcontracts have not been modified to remove or amend the authorization and consent clause. Appx139; *see also* Appx133-134.

In hopes of disposing of this action promptly and conserving party and judicial resources, AeroVironment alerted the Arltons that Section 1498 precluded relief in the District Court and that their only remedy for the acts complained of was to file suit at the COFC. On September 15, 2020, AeroVironment advised the Arltons that they had no basis to recover for patent infringement against AeroVironment because Ingenuity was designed and built for the Government and with the Government's authorization and consent. Appx872. AeroVironment cited controlling legal authority and attached a copy of the JPL Operating Contract to its correspondence. Appx872-873.

AeroVironment thus provided almost immediately after this suit was filed both the factual and legal bases for its position that the Arltons' remedy, if any, would lie in a suit against the Government at the COFC under 28 U.S.C. § 1498(a). Appx872-873. Notwithstanding the clear contractual language and precedent, however, the Arltons refused to yield to reason.

On November 24, 2020, AeroVironment wrote to the Arltons to inform them that AeroVironment would seek leave to move for early summary judgment on its Section 1498 defense. Appx875. In the parties' Rule 26(f) report, AeroVironment explained why Section 1498 provided a complete defense to the Arltons' Complaint and requested leave to file an early summary judgment motion on that defense. Appx116-119.

In its Scheduling Order, the District Court instructed that “the parties should meet and confer on Defendant’s anticipated Section 1498 motion, and insofar as discovery may be necessary, they should seek to agree to conduct the relevant discovery first.” Appx129. Appellants instead insisted on full discovery, demanding technical details regarding Ingenuity that were irrelevant to AeroVironment’s motion and unnecessarily multiplying the effort AeroVironment expended to resolve this case. Appx878.

On December 24, 2020, AeroVironment wrote to Appellants in advance of a meet and confer, stating that they should be prepared “to explain and provide authority for the materiality of any additional discovery to AeroVironment’s § 1498 defense” during the meet and confer. Appx135. Appellants, however, offered neither sufficient justification nor authority for why the broad discovery they sought was relevant to AeroVironment’s Section 1498 defense. *See* Appx13-14.

On December 30, 2020, AeroVironment produced the Ingenuity Subcontracts, enabling the Arltons to confirm that these, too, contained the broad express authorization and consent clause. Appx135; *see also* Appx139, Appx142, Appx150, Appx157, Appx166-167, Appx170, Appx171. The next day, the Arltons declined yet another opportunity to dismiss their case, asserting that they “w[ould] not go away based on AeroVironment’s mere say-so that everything they do is [G]overnment sanctioned, especially not in the face of such egregious infringement.”

Appx882. By this time, however, it was abundantly clear that it was the express language of the contracts, not “mere say-so,” that AeroVironment was acting with the United States’ imprimatur.

And it was not a close call. The JPL Operating Contract and Ingenuity Subcontracts were facially dispositive of AeroVironment’s Section 1498 defense. Appellants simply decided to ignore the uncontroverted evidence.

AeroVironment gave the Arltons yet another opportunity to course-correct before filing its summary judgment motion. *See* Appx884-892. AeroVironment offered to explore resolution of the case short of motions practice, reiterating that AeroVironment considered this case exceptional and noting “that AeroVironment’s attorney expense is going to increase markedly due to briefing summary judgment and this discovery dispute.” Appx892. AeroVironment advised that, in the absence of a prompt and suitable response, AeroVironment “plan[ned] to file [its] summary judgment motion with the Court by February 12, 2021.” Appx892. Once again, the Arltons resisted. Appx894.

AeroVironment filed its Motion for Summary Judgment on February 16, 2021, presenting the exact argument that it had previewed to the Arltons. The next day, the United States filed its Statement of Interest, confirming “that the United States has granted AeroVironment, Inc. the Government’s ‘authorization and consent’ as to acts alleged to have been committed by it in this litigation,” and

reiterating that “the effect of such ‘authorization and consent’ is to relieve the defendant of any liability for patent infringement resulting from such acts for the benefit of the United States and to transfer to the United States any liability for any manufacture or use of the inventions claimed in the patent in suit resulting from the authorized or consented acts.” *See* Appx172-173. The Government emphasized that “to the extent that liability exists for such acts, the patentee is limited to pursuing a claim against the United States in the Court of Federal Claims under 28 U.S.C. § 1498(a).” Appx173.

Once the Government confirmed that it had granted authorization and consent and accepted liability for AeroVironment’s allegedly infringing acts, the only reasonable course of action was for the Arltons to dismiss this case. Instead, they pressed on, filing an opposition to AeroVironment’s Motion for Summary Judgment that barely acknowledged the Government’s position, let alone explained how the case could possibly survive the Government’s express assumption of liability. *See* Appx315-510.

The Arltons instead offered a new argument for why Section 1498 did not apply – that the Small Business Innovation Research (“SBIR”) Statute (15 U.S.C. § 638 (2012)) entitled the Arltons’ company, Lite Machines Corporation, to the Ingenuity Subcontracts. Appx328-331. The COFC had rejected an analogous argument in a breach of contract case that Lite Machines had filed involving the very

same SBIR contracts that the Arltons claimed created an entitlement to the Ingenuity Subcontracts. *Lite Machines Corp. v. United States*, 143 Fed. Cl. 267, 284 (2019).

Just as they ignored the Government's Statement of Interest, the Arltons ignored that the COFC had rejected their SBIR argument (in accordance with Federal Circuit precedent), failing even to cite, let alone distinguish, the clearly relevant adverse precedent of which they were aware. Only *after* AeroVironment brought these cases to the District Court's attention in its reply brief did the Arltons address them. *See* Appx511-609, Appx680-684; *see also* Pls.' Ex Parte Appl. for Leave to File Sur-Reply, *Arlton v. AeroVironment, Inc.*, No. 2:20cv7438 (C.D. Cal. Mar. 17, 2021), ECF No. 42.

The Arltons' ensuing emergency *ex parte* motion to file a sur-reply created unnecessary burdens on the District Court and AeroVironment. Appx680-684. The Arltons offered no credible reason that they could not have disclosed or distinguished the adverse precedent in their opposition brief. Instead, the Arltons attempted to justify their request with a remarkable argument that referencing these published federal court opinions would reveal classified material. Appx681-684. While the District Court allowed the Arltons to file their sur-reply, it rejected their arguments as unpersuasive. Appx13.

This is Appellants' pattern. Time and again, they make arguments that had been explicitly considered and rejected by the courts, without any attempt to

distinguish overwhelming adverse authority or offer a credible reason to deviate therefrom. For example, the Arltons suggested, without citation, that their declaratory judgment claims were not subject to Section 1498. Appx334. Courts have already rejected this premise. *See Robishaw Eng'g, Inc. v. United States*, 891 F. Supp. 1134, 1146 (E.D. Va. 1995) (“Congress intended § 1498 to be an exclusive remedy, and to forbid declaratory judgment actions”). Appellants even conceded that they did not thoroughly research their legal arguments before raising them with the District Court. *See Appx752*.

With AeroVironment’s summary judgment motion pending, the Arltons sought leave to amend their Complaint to add trade secret claims not subject to Section 1498. Appx610-679. The Arltons first notified AeroVironment that they planned to file a motion to amend to add such claims less than 24 hours after the United States filed its Statement of Interest confirming AeroVironment’s Section 1498 immunity.

In denying the Arltons’ Motion to Amend, the District Court found that the Arltons “were not diligent in seeking leave to amend the Complaint,” as “[the Arltons] received Defendant’s only production on December 30, 2020,” but “did not start contemplating seeking leave to amend until about January 31, 2021, which [the Arltons] admit was after the January 8, 2021 deadline to file a motion for leave to amend,” and even still “did not seek leave to amend until nearly two months after

this date.” Appx15. The District Court noted that the Arltons waited until “after Defendant’s dispositive motion on its § 1498 defense was fully briefed to file its motion for leave to amend.” Appx15. AeroVironment expended additional resources opposing the motion to amend, even though it would be moot in the event the District Court granted AeroVironment’s fully-briefed Motion for Summary Judgment. Notwithstanding, the Arltons filed a second emergency *ex parte* application to continue the summary judgment hearing, purportedly because the “resources of the parties and the Court would be better served if the hearing on the Motion for Summary Judgment is continued to allow the Court to consider the Motion for Leave.” Pls.’ Ex Parte Appl. to Continue Hr’g on Def.’s Mot. for Summ. J. at 5, *Arlton v. AeroVironment, Inc.*, No. 2:20cv7438 (C.D. Cal. Mar. 23, 2021), ECF No. 49. The District Court properly denied the Arltons’ request for continuance, Order Denying Pls.’ Ex Parte Appl., *Arlton v. AeroVironment, Inc.*, No. 2:20cv7438 (C.D. Cal. Mar. 25, 2021), ECF No. 51, but their emergency application was unnecessary in the first instance because they admitted that the “summary judgment motion is unaffected by the proposed amendments.” Appx321.

Ultimately, the Arltons’ motion for leave to amend was untimely and frivolous. Appellants knew of AeroVironment’s intention to seek summary judgment since at least November 17, 2020, and they knew of all the facts alleged

in the proposed amended complaint at the outset of this action. Yet, they waited until three days before the summary judgment hearing to file their motion.

The District Court granted AeroVironment's Motion for Summary Judgment and denied as untimely the Arltons' Motion for Leave to Amend on April 22, 2021. Appx15. Judgment in AeroVironment's favor was entered on May 12, 2021. Order Entering Summ. J. in Favor of AeroVironment, *Arlton v. AeroVironment, Inc.*, No. 2:20cv7438 (C.D. Cal. May 12, 2021), ECF No. 61.

Shortly thereafter, the Arltons filed a Motion for Relief from Judgment Under Fed. R. Civ. P. 60 and Motion to Alter Judgment Pursuant to Fed. R. Civ. P. 59. Appx767-804. The Arltons based their motion on a recently-aired *60 Minutes* segment entitled "*Ingenuity and Perseverance*" that introduced "Terry," a terrestrial version of Ingenuity. Appx767-801. AeroVironment used Terry as a stand-in for Ingenuity during media appearances, educational events, public service events, and Government presentations. Appx1333-1355.

The District Court concluded that there existed "the potential for the 'Terry' helicopter to be sold for purposes other than 'for the government' as with the Mars Ingenuity Helicopter." Appx21. Accordingly, the District Court vacated its grant of summary judgment and reopened the case to permit the Arltons limited discovery into any commercial sales or uses of Terry. Appx21. The District Court was clear, however, that the Arltons bore the burden of "show[ing] that [AeroVironment] sold

or offered to sell these helicopters commercially, or otherwise used them commercially in a substantial way,” and that AeroVironment would be entitled to re-entry of summary judgment if the Arltons could not carry this burden. Appx21.

After nearly two years of additional discovery, the Arltons filed their renewed opposition to AeroVironment’s Motion for Summary Judgment on March 30, 2023. Appx1421-1592. They could not meet the burden the District Court set for them, however, because the record plainly demonstrated that AeroVironment was not using Terry in any way that would deprive it of its Section 1498 defense. To the contrary, the record demonstrated that JPL contracted to use Terry “to support ongoing acoustic investigations of Ingenuity on the surface of Mars, with the ground-truth data” from Terry under AeroVironment’s existing JPL subcontracts. Appx1030-1034.

In their renewed opposition to summary judgment, the Arltons offered only baseless arguments. For instance, they argued that AeroVironment “used” their technology by “accept[ing] the [Collier] trophy for its part in developing the Mars Helicopter Ingenuity and prominently sponsored the award dinner thereby associating itself with aviation industry giants such as Boeing, Rolls-Royce, General

Electric, and Northrop Grumman.”¹ Appx1437, Appx1439 (arguing that acceptance of the trophy was “clearly” not *de minimis* use).

The District Court rejected these arguments, stating that “the activities on which [the Arltons] rely either relate to discussing or demonstrating the use protected by § 1498; are *de minimis* under § 1498; or are nonactionable in any event. Evidence showing that AeroVironment *might* leverage Ingenuity and Terry for commercial applications in the future is insufficient to show substantial commercial use of the accused technology right now.” Appx29. The District Court re-entered summary judgment in AeroVironment’s favor but denied AeroVironment’s renewed motion for Attorneys’ Fees. Appx31-32, Appx33-39.

SUMMARY OF THE ARGUMENT

This case should never have been filed, and AeroVironment should not have needed to expend hundreds of thousands of dollars to litigate it to conclusion. The law is clear: A patentee’s sole remedy for the use or manufacture of a patented invention for the Government and with the Government’s authorization and consent is “by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture.” 28 U.S.C. § 1498(a). The Arltons concede that AeroVironment’s

¹ Among other problems with this argument, Ingenuity was on Mars and not within AeroVironment’s control.

work on the Mars Helicopter Program was “for the Government,” and they do not dispute that all relevant contracts include a broad authorization and consent clause. Nor do they deny that the Government’s Statement of Interest explicitly confirms AeroVironment’s Section 1498 immunity.

Instead, the Arltons argue that because their company, Lite Machines, had SBIR contracts, Lite Machines had an absolute entitlement to receive the Ingenuity Subcontracts. According to the Arltons, this alleged entitlement negates AeroVironment’s Section 1498 defense.

This argument is facially baseless. Even if this Court assumes that Lite Machines was, in fact, entitled to the Ingenuity Subcontracts (it was not), that challenge needed to be brought *by Lite Machines before* the Ingenuity Subcontracts were awarded. The Arltons cannot raise it at all, much less years later, without Lite Machines, in a patent suit.

Timeliness aside, Appellants’ argument is substantively meritless, as this Court squarely rejects the proposition that the SBIR Statute *entitles* a contractor to Phase III work. *See Night Vision Corp. v. United States*, 469 F.3d 1369, 1374 (Fed. Cir. 2006). The COFC likewise rejected this argument when Lite Machines raised it in a case the Arltons failed to cite below. *See Lite Machines*, 143 Fed. Cl. at 289.

Finally, even if the SBIR Statute did provide an entitlement to Phase III work, there is no legal basis for holding that this entitlement has *any* effect on the Government's ability to exercise its eminent domain powers under Section 1498.

In short, the undisputed record shows that Section 1498 applies to AeroVironment's work on the Mars Helicopter program. AeroVironment's work on Terry, the Earth-bound stand-in for the Ingenuity, is likewise covered. AeroVironment created Terry at JPL's suggestion using independent research and development ("IR&D") funds, which are reimbursed by the Government as part of a contractor's indirect costs. JPL later contracted with AeroVironment to use Terry to assist on the Mars Helicopter program under a contract containing the same authorization and consent given for the work on the Ingenuity. Terry has never been sold commercially. Terry thus falls within the broad scope of Section 1498 immunity.

For all of these reasons, the District Court correctly granted summary judgment in AeroVironment's favor.

The District Court likewise correctly denied the Arltons' motion for leave to amend their Complaint. The Arltons filed their motion over a month late and failed to show good cause for their tardiness.

On the other hand, considering the Arltons' facially baseless positions and the unreasonable way they litigated this case, the District Court erred in denying

AeroVironment's motion for attorneys' fees. While the District Court has discretion in deciding whether to award fees, that discretion is not unlimited; here, the totality of the circumstances amply demonstrates that this is an exceptional case. Throughout this litigation, the Arltons repeatedly pressed claims that were plainly barred by Section 1498, persisting even after the Government's Statement of Interest confirmed that Section 1498 applied.

As this Court has made clear, Section 1498 is intended not only to shield contractors from liability, but also "to relieve private Government contractors from expensive litigation with patentees." *Astornet Techs. Inc. v. BAE Sys., Inc.*, 802 F.3d 1271, 1277 (Fed. Cir. 2015) (quoting *TVI Energy Corp. v. Blane*, 806 F.2d 1057, 1059-60 (Fed. Cir. 1986)). This reflects the history and purpose of Section 1498, which grew out of concerns that allowing contractors to be "exposed to expensive litigation" would make them "reluctant to take contracts." *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 342-43 (1928) (quoting then-Acting Secretary of the Navy Franklin D. Roosevelt).

At every turn, Appellants unnecessarily complicated this matter, despite it being crystal clear from inception that Appellants could not recover from AeroVironment for its allegedly infringing acts. An award of fees is particularly appropriate here, where the Arltons' actions forced AeroVironment to litigate a matter that, had the Arltons bothered even to consider the basic facts and relevant

law, would instead have been filed against the Government in the COFC. Instead of being relieved of the expense of patent litigation as Congress intended, AeroVironment incurred considerable legal fees defending against the Arltons' unreasonable approach to litigating its meritless claims.

The Arltons, not AeroVironment, should bear the consequences of their strategy. The District Court abused its discretion in deciding otherwise.

STANDARD OF REVIEW

The District Court's decision to grant summary judgment is reviewed *de novo* and, "[i]n the Ninth Circuit, the denial of a motion to amend is reviewed for abuse of discretion." *Net MoneyIN, Inc. v. VeriSign, Inc.*, 545 F.3d 1359, 1365 (Fed. Cir. 2008). Under Federal Circuit Law, a District Court's decision to deny a motion for attorneys' fees under 35 U.S.C. § 285 is reviewed for abuse of discretion. *AdjustaCam, LLC v. Newegg, Inc.*, 861 F.3d 1353, 1358-59 (Fed. Cir. 2017).

ARGUMENT

I. The District Court Correctly Granted Summary Judgment In AeroVironment's Favor.

To prevail on the Section 1498 defense, an accused infringer must show that the patented invention was used "by or for the United States." *See* 28 U.S.C. § 1498(a). Demonstrating use "for the United States" requires establishing that the use was (1) "for the Government" and (2) "with the authorization or consent of the Government." *Toxgon Corp. v. BNFL, Inc.*, 312 F.3d 1379, 1381 (Fed. Cir. 2002).

The Arltons concede the first element, admitting that “it is undisputed that AeroVironment made the Mars Helicopter on behalf of the Government.” Op. Br. at 30. The Arltons resisted this principle until their opening brief in this Court, even though it is well-established that infringing activity undertaken pursuant to a Government contract or subcontract is “for the Government.” *Sevenson Env’t Servs., Inc. v. Shaw Env’t, Inc.*, 477 F.3d 1361, 1366 (Fed. Cir. 2007) (“[W]here infringing activity has been performed by a Government contractor pursuant to a government contract and for the benefit of the Government, courts have all but bypassed a separate inquiry into whether infringing activity was performed ‘for the Government.’”). Thus, when the allegedly infringing conduct occurs under a Government contract, “the inquiry has reduced to the ‘very simple question’ of whether...‘the [G]overnment authorized or consented to the...infringement..., if such infringement in fact occurred.” *Id.* (quoting *Auerbach v. Sverdrup Corp.*, 829 F.2d 175, 180-81 (D.C. Cir. 1987)).

The undisputed evidence clearly establishes that the authorization and consent element is satisfied. **First**, the JPL Operating Contract and Ingenuity Subcontracts contain express authorization and consent clauses. **Second**, the Government’s Statement of Interest confirms that it authorized and consented to AeroVironment’s allegedly infringing activity.

Because the record indisputably establishes both elements of the Section 1498 defense, AeroVironment has a complete defense to the infringement asserted in the Complaint. Summary judgment in AeroVironment’s favor should be affirmed.

A. Section 1498 Provides a Contractor with Broad Immunity Against Patent Infringement.

Pursuant to 28 U.S.C. § 1498(a), a patentee’s only remedy for the use of a claimed invention by or on behalf of the Government is an action against the Government at the COFC:

Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner’s remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture...

For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor . . . for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

28 U.S.C. § 1498(a). This remedy is “exclusive and comprehensive” of any other, including an action against a contractor that facilitated the Government’s use. *Richmond Screw*, 275 U.S. at 343-44 (“The word ‘entire’ emphasizes the exclusive and comprehensive character of the remedy provided.”); *Astornet Techs.*, 802 F.3d at 1277 (“As indicated by the statute’s use of the definite article in providing ‘the

owner's remedy' and its statement that the remedy is for payment of the owner's 'entire compensation,' the statute, within its ambit, makes the remedy against the United States exclusive.”).

Congress enacted Section 1498 to “relieve the contractor *entirely* from liability of every kind for the infringement of patents in manufacturing anything for the government, and to limit the owner of the patent . . . to suit against the United States . . . for the recovery of his reasonable and entire compensation for such use and manufacture.” *Richmond Screw*, 275 U.S. at 343-44 (emphasis added); *see also Zoltek Corp. v. United States*, 672 F.3d 1309, 1324 (Fed. Cir. 2012) (partial *en banc*) (reaffirming the *Richmond Screw* rationale).

As the Supreme Court emphasized, Section 1498 was enacted ‘to stimulate contractors to furnish what was needed for the [First World] War, without fear of becoming liable themselves for infringements to inventors or the owners or assignees of patents.’” *Richmond Screw*, 275 U.S. at 345. Congress later broadened the statute “at the behest of the Secretary of the Navy who cited difficulties in procuring goods from private manufacturers necessary to meet military requirements of World War I.” *TVI Energy*, 806 F.2d at 1060). Thus, “the coverage of § 1498 should be broad so as not to limit the Government’s freedom in procurement by considerations of private patent infringement.” *Id.*

B. The Undisputed Record Shows That the Government Assumed Liability for AeroVironment’s Work on the Mars Helicopter Program Under 28 U.S.C. § 1498.

“In some circumstances, the Government clearly and expressly authorizes and consents to the infringement of a patented invention in the performance of a Government contract.” *Madey v. Duke Univ.*, 413 F.Supp.2d 601, 607 (M.D.N.C. 2006). “Such express consent is often contained in the language of the Government contract itself, or in other formal, written authorization from the Government.” *Id.* at 607-08; *Hughes Aircraft Co. v. United States*, 534 F.2d 889, 901 (Ct. Cl. 1976) (recognizing that authorization and consent may be contained in a contract or in a subsequent writing from the Government, and that such express authorization and consent “comports with the broad purpose and policy of § 1498(a)”; *cf. Auerbach*, 829 F.2d at 180 (“[T]he case reduces to a very simple question: do appellees establish that the [G]overnment authorized or consented to the copyright infringement . . . Obviously express documentary evidence will do, which typically will consist of a contractual clause setting forth the government’s assumption of liability.”).

The JPL Operating Contract includes the Government’s express authorization and consent to “all use and manufacture of any invention described in and covered by a United States patent in the performance of [the] contract or any subcontract at any tier.” *See* 48 C.F.R. § 52.227-1, Alternate I (2007); Appx165 (incorporating

§ 52.227-1, Alternate I (2007) by reference); *see also* Appx139, Appx133. The JPL Operating Contract also requires JPL to “include the substance of this [authorization and consent] clause . . . in all subcontracts that are expected to exceed the simplified acquisition threshold,” but makes clear that even the “omission of this clause from any subcontract, including those at or below the simplified acquisition threshold . . . does not affect this authorization and consent.” 48 C.F.R. § 52.227-1(b).

The Ingenuity Subcontracts extended the Government’s authorization and consent to AeroVironment for all work performed in furtherance of the subcontracts. Appx133, Appx139, Appx142, Appx150, Appx157, Appx166-167, Appx170, Appx171. AeroVironment is entitled to rely on this grant. *Madey*, 413 F. Supp. 2d at 609 (“When the Government chooses to provide such express authorization and consent as part of a Government program or contract, a contractor or sub-contractor is entitled to rely on that authorization, and is entitled to the affirmative defense provided by § 1498 for uses of patented inventions within the scope of the consent.”).

The specific authorization and consent clause incorporated in the JPL Operating Contract and flowed down to AeroVironment in the Ingenuity Subcontracts is the “Alternate I” clause. This is the broadest possible authorization and consent clause in the FAR. *Compare* 48 C.F.R. § 52.227-1(a) (providing authorization and consent for inventions “[e]mbodied in the structure or composition

of any article the delivery of which is accepted by the Government” or “[u]sed in machinery, tools, or methods whose use necessarily results from compliance by the Contractor or a subcontractor with (i) specifications or written provisions forming a part of this contract or (ii) specific written instructions given by the Contracting Officer directing the manner of performance”) *with* 48 C.F.R. § 52.227-1, Alternate I (providing authorization and consent “to *all* use and manufacture of *any* invention described in and covered by a United States patent in the performance of this contract”) (emphasis added).

FAR 52.227-1, Alternate I, was necessary because the JPL Operating Contract and Ingenuity Subcontracts are, at bottom, research and development (“R&D”) contracts. The Government recognizes that the precise scope of R&D work cannot be fully defined in advance and that any R&D effort risks patent infringement lawsuits, both meritorious and meritless. To ensure that the most qualified companies are willing to take on vital R&D work for the Government, therefore, the Government provides blanket authorization and consent to patent infringement for such projects, and the FAR instructs contracting officers to “[u]se the clause [at FAR 52.227-1] with its Alternate I in all R&D solicitations and contracts for which the primary purpose is R&D work.” 48 C.F.R. § 27.201-2(a)(2); *see also Madey*, 413 F. Supp. 2d at 608.

It is undisputed that AeroVironment's allegedly infringing conduct occurred pursuant to the Ingenuity Subcontracts and that these subcontracts contain the broadest possible express authorization and consent clause. Accordingly, there can be no reasonable debate that the Government authorized and consented to AeroVironment's use, if any, of the '763 patent in performing the acts underlying the Arltons' Complaint. It follows that the Arltons' exclusive remedy is "by action against the United States in the United States Court of Federal Claims for the recovery of [their] reasonable and entire compensation for such use." 28 U.S.C. § 1498(a).

The Government's Statement of Interest, filed on the heels of AeroVironment's summary judgment motion, extinguished any potential issue of authorization and consent. Appx340-357, Appx172-178. There is no "requirement that authorization or consent necessarily appear on the face of a particular contract." *Hughes Aircraft Co.*, 534 F.2d at 901. All that is required are "explicit acts or extrinsic evidence sufficient to prove the government's intention to accept liability for a specific act of infringement." *Auerbach*, 829 F.2d at 177. The Government's Statement of Interest clearly meets this standard.

In light of the express grants of authorization and consent in the contracts and the Government's Statement of Interest, the District Court correctly granted summary judgment in AeroVironment's favor. Appx15.

C. The SBIR Statute Does Not Defeat AeroVironment's Section 1498 Immunity.

The Arltons do not dispute that both the JPL Operating Contract and the Ingenuity Subcontracts contain express authorization and consent clauses that authorize the use of patented technology for AeroVironment's work on the Mars Helicopter Program. Appx1065-1067. Nor do they dispute that the Government's Statement of Interest confirmed this authorization and consent. Op. Br. at 11-12. Instead, the Arltons argue that, despite the express language of Section 1498, the SBIR Statute (15 U.S.C. § 638 (2012)) eliminates the Government's authority to exercise its eminent domain power and assume liability for its contractors' infringement of the Arltons' patents. *Id.* at 12. This is nonsense.

Appellants' baseless argument hinges on the untenable premise that the SBIR Statute and policy directive *required* that Lite Machines receive the Ingenuity Subcontracts, making the award to AeroVironment improper. According to the Arltons, AeroVironment's accused conduct, occurring under improperly-awarded contracts, cannot be covered by Section 1498. This argument fails as a matter of law.

1. *The District Court Had No Power to Entertain the Arltons' Belated Challenge to the Mars Helicopter Procurement.*

As a threshold matter, the District Court was without power to entertain the Arltons' argument that award of the Ingenuity Subcontracts to AeroVironment

violated the SBIR Statute. This argument is, essentially, a bid protest over which the District Court lacks jurisdiction. *See Res. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1246 (Fed. Cir. 2010) (“Congress intended the 1491(b)(1) jurisdiction to be exclusive where 1491(b)(1) provided a remedy (in procurement cases).”). As an “alleged violation of statute or regulation in connection with a procurement or a proposed procurement[,]” the only federal court empowered to hear Appellants’ argument is the COFC. 28 U.S.C. § 1491(b)(1).²

More remarkably, despite Appellants’ assertion that “the Government was bound by law to award the Phase III Mars Helicopter program to Lite,” Op. Br. at 34-35, their brief does not identify *any* Government contract that they allege should have been awarded to Lite Machines.

The Arltons wisely do not contend that the JPL Operating Contract is an SBIR Phase III contract, because it plainly is not. Instead, they argue that JPL was required to award the Ingenuity Subcontracts to Lite Machines as a sole-source SBIR Phase III award. Even if true, the Arltons do not explain how a failure by JPL to award a subcontract to a SBIR recipient abrogates NASA’s decision to include an express

² The Arltons do not shoulder their responsibility to establish standing here, where the AeroVironment subcontract it challenges is just that—a subcontract. The Tucker Act’s bid protest jurisdiction generally extends only to the award of Federal contracts—not subcontracts. 28 U.S.C.A. § 1491(a); *Erickson Air Crane Co. of Wash. v. United States*, 731 F.2d 810, 813 (Fed. Cir. 1984) (“The [G]overnment consents to be sued only by those with whom it has privity of contract, which it does not have with subcontractors.”).

authorization and consent clause in the JPL Operating Contract or the requirement that the clause be flowed down to all subcontractors.

Finally, although NASA and JPL have argued that JPL-awarded subcontracts are immune from challenge under the procurement laws because JPL-awarded subcontracts are “a subcontract award by a prime contractor of the government—not a procurement by a federal agency[,]” *Radiation Sys., Inc.*, B-244561, Oct. 16, 1991, 91-2 CPD ¶ 342, Appellants’ challenge would be untimely in any event. Because the Arltons assert that the Ingenuity Subcontracts should have been awarded on a sole-source basis to Lite Machines, any protest would have needed to have been filed **before award** to AeroVironment. See *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007). Instead, Lite Machines took no action.³

A patent suit is not a back-door remedy for an allegedly improper procurement. If Appellants believed that the Government “allegedly violated the statement in 15 U.S.C. § 638(r)(4) that an agency, to the greatest extent practicable, should award Phase III contracts to the SBIR firm which developed the desired technology,” it was incumbent upon Lite Machines to “file[] a bid protest challenging the...award.” *Lite Machines*, 143 Fed. Cl. at 285-87. That the award

³ The Arltons, of course, would not have standing to file a bid protest. *Orion Tech., Inc. v. United States*, 704 F.3d 1344, 1348 (Fed. Cir. 2013) (noting that to be considered an “interested party” with standing to file a bid protest, the party must be a company that submitted a bid or plans to submit a timely bid).

was not challenged *in any fashion* is ample reason for this Court to affirm the District Court's grant of summary judgment in AeroVironment's favor.

2. ***Even if the District Court Could Have Entertained the Arltons' SBIR Argument, the Argument is Wrong as a Matter of Law.***

First, the COFC's *Lite Machines* decision confirms that the Arltons' SBIR argument is wrong as a matter of law. *Id.* at 281. *Second*, even if the SBIR preference *did* entitle Lite Machines to the Ingenuity Subcontracts, that entitlement would nevertheless be irrelevant to AeroVironment's Section 1498 immunity. There is no authority for the proposition that the SBIR preference negates the Government's eminent domain power to assume patent infringement liability. Neither is there any conflict between the SBIR Statute and Section 1498 because Section 1498 does not deprive the Arltons of a remedy. It simply provides a remedy against a different party in a different court. Thus, contrary to the impression left by the Arltons' brief, their ability to recover for alleged patent infringement is not imperiled.

a. **No evidence supports the Arltons' contention that the Mars Helicopter is a SBIR Phase III Program.**

First, although the Arltons assert that "there is no dispute that the Mars Helicopter program is an SBIR Phase III program under the SBIR statute," Op. Br. at 31, nothing in the record supports this assertion; it is not true. Appellants' argument that the Mars Helicopter program is a SBIR Phase III effort because

“NASA itself purported to authorize and consent to AeroVironment’s use of the ’763 patent for the Mars Helicopter Ingenuity,” Op. Br. at 32, misconstrues the nature of authorization and consent. The authorization and consent clause at issue here is a *general assumption of liability*, not a *specific decision* to use Appellants’ patent.⁴

In fact, the only evidence the Arltons cite to support their assertion that the Mars Helicopter program is a SBIR Phase III effort is Paul Arlton’s self-serving declaration that “Dave and I expected Lite Machines to receive an SBIR Phase III sole-source prime contract for the Mars Helicopter program.” Appx363. This establishes neither that Ingenuity incorporated the Arltons’ technology nor that the Mars Helicopter program is a SBIR Phase III program.

Notably, the Arltons never introduced any technical evidence about Lite Machines’ SBIR Phase I and II Tiger Moth UAV nor attempted to establish a connection between that technology and the technology used in Ingenuity. Rather, they simply declare Ingenuity a Phase III effort and expect the Court to accept that as *fait accompli*. They are not only powerless to do so, they are wrong.

Appellants’ assertion that “the contracts incorporated technology from the ’763 patent” that was licensed to both Lite Machines and to the Government is self-

⁴ A similar misunderstanding underlies the Arltons’ surprise that the Government moved to dismiss their Section 1498 claim at the COFC despite having “purportedly consented to liability.” Op. Br. at 14 n.5.

defeating. Appx360, Appx362. Lite Machines' SBIR contracts incorporated the standard Patent Rights clause at 37 C.F.R. § 401.14 (Dec. 2007), setting forth the Government's and awardee's rights with respect to inventions made in performance of work thereunder. Appx382, Appx386. That clause permits the SBIR awardee to elect to retain ownership of any such inventions in exchange for granting the Government a "nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced on its behalf, the subject invention throughout the world." See 37 C.F.R. § 401.14(b); 35 U.S.C. §§ 200-212.

Thus, if the invention claimed in the '763 patent was made under Lite Machines' SBIR contracts, the Government would have at least a license to "practice, or have practiced on its behalf" those inventions on the Mars Helicopter program, and Lite Machines would own the patent. But, it is *the Arltons* who own the patent as individuals and non-exclusively license it, for a fee, to Lite Machines. Appx360, Appx362, Op. Br. at 4, 6 n.1, 12. That the Arltons collected royalties for the '763 patent, in addition to Lite Machines' payments under its SBIR contracts, demonstrates that the '763 patent was developed outside of Lite Machines' SBIR contracts. Appx362.

Finally, Lite Machines is not a party to this case (and, as discussed below, the District Court properly denied leave to amend to add it as a party). Even if Lite Machines had a valid claim against NASA and JPL for awarding the Ingenuity

Subcontracts to AeroVironment, and even if there was merit to the contention that a SBIR preference can negate Section 1498 immunity, that claim would belong to Lite Machines. The Arltons offer no reason why they should be able to assert a third party's SBIR preference in a patent case that does not involve that third party.

b. Lite Machines was not entitled to the Ingenuity Subcontracts.

In *Lite Machines Corp. v. United States*, 143 Fed. Cl. 267, 281 (2019), Lite Machines challenged the Air Force's award of a purported Phase III contract to AeroVironment, allegedly related to Lite Machine's Phase I and II efforts for its Tiger Moth UAV. Mirroring the Arguments made by the Arltons in this action, Lite Machines argued to the COFC that it "developed the Tiger Moth UAV pursuant to contracts issued as part of the SBIR program" and that the Air Force was therefore *required* to award further SBIR contracts to Lite Machines pursuant to the SBIR Statute.

The COFC rejected this argument, holding that the "the statute at 15 U.S.C. § 638 and the Small Business Administration's policy directive,⁵ however, both indicate that the Air Force was not *required* to award a contract for the T1

⁵ The Arltons cite to a 2019 policy directive that did not exist when any of the relevant contracts were awarded. Op. Br. at 41. As the COFC noted, the "policy directive in effect when the 2013 Contract was awarded to Lite Machines . . . was published on August 6, 2012." *Lite Machines*, 143 Fed. Cl. at 281 (citing Program Policy Directive, 77 Fed. Reg. 46,806, 46,820 (Aug. 6, 2012)).

Requirements to Lite Machines, as a result of the statute using the word ‘may.’” *Lite Machines*, 143 Fed. Cl. at 284 (emphasis added). The COFC dismissed the relevant counts of Lite Machines’ complaint accordingly. *Id.* at 289.

Indeed, this question was resolved over a decade earlier. In *Night Vision Corp. v. United States*, this Court held that the exact argument Appellants now make “is not supported by, and is inconsistent with, the language and meaning of § 638(j)(2)(C), which does not impose such a requirement on the government[,]” but rather “deals with ‘procedures’ to accomplish the stated objective; it does not mandate particular action to achieve those results.” 469 F.3d 1369, 1374 (Fed. Cir. 2006).

The Arltons suggest that *Night Vision* should be ignored because the SBIR Statute was amended in 2012.⁶ Op. Br. at 37. As the COFC noted in its *Lite Machines* decision, the version of 15 U.S.C. § 638 that the Federal Circuit considered in *Night Vision* contained the same “to the extent practicable” language as the version of the statute relied on by Appellants, reinforcing that the SBIR Statute establishes a *preference*, not a *mandate*. See *Lite Machines*, 143 Fed. Cl. at 285 & n.13 (2019).

⁶ Appellants suggest that the District Court erred “by relying on this Court’s decision in *Night Vision Corp. v. United States*, 68 Fed. Cl. 368, 381 (2005).” Op. Br. at 36. The District Court did not rely on the COFC’s *Night Vision* decision, but rather this Court’s binding precedential decision. See Appx12.

There is no reason to permit Appellants to go back to this well. As this Court recognized in *Night Vision*, the Arltons’ position “would seriously limit the government’s ability to select the form of procurement that it considers most appropriate in the particular situation.” 469 F.3d at 1374. After completion of Phase I and II contracts, “it is within the government’s discretion to select the particular form the procurement will take. It could be a Phase III contract, which the statute favors, but does not require, awarded to the small business concern that performed the Phase I and II contracts. It could be a negotiated contract with a particular supplier. Or, as was done in this case, it could be a competitively-let contract.” *Id.* “In sum, § 638 imposes no duty on the [G]overnment to award a Phase III contract to a concern that successfully completes a Phase II contract,” and therefore “Section 638 creates no rights for any private entities.” *Id.*

In short, Lite Machines was not entitled to the Ingenuity Subcontracts. The award to AeroVironment, including the express authorization and consent clause, was proper, leaving no question that Section 1498 applies.

c. Even if the Ingenuity Subcontracts were improperly awarded, AeroVironment is still immune from suit.

As explained above, nothing about the SBIR Statute required awarding the Ingenuity Subcontracts to Lite Machines. Even if the Court were to assume that these subcontracts were improperly awarded, however, and that the wrong party is now raising this argument in the wrong place and at the wrong time, the Arltons

offer no authority to support the proposition that an improperly awarded contract negates AeroVironment's Section 1498 immunity. It does not; even under a defective contract, AeroVironment's accused conduct would still be "for the Government" and with the Government's authorization and consent.

As this Court has explained, if two "statutes contain mandatory language, we must determine whether and to what extent they conflict with one another," and "[i]f it is possible to give effect to both statutes, we must do so." *PDS Consultants, Inc. v. United States*, 907 F.3d 1345, 1357-58 (Fed. Cir. 2018). Thus, "[i]f any interpretation of the statutory provisions at issue allows both statutes to remain operative, the court must adopt that interpretation absent a clear congressional directive to the contrary." *Id.*

While Appellants argued below that the "ultimate question presented" is "whether the addition of a FAR clause, 48 C.F.R. § 52.227-1, and, by extension, Section 1498 can apply to permit an infringer to avoid liability for patent infringement where application of Section 1498 would *expressly contradict* the SBIR Statute," that argument is conspicuously absent from their brief. *See* Appx330. Now, the Arltons bypass the required statutory analysis and argue, instead, about which policy they think is more important. Absent conflict between the statutes, there is nothing for the Court to resolve.

Not only have the Arltons failed to identify any conflict between the SBIR Statute and Section 1498, in practice, the statutes work in harmony. The SBIR Statute states that “[e]ach funding agreement under an SBIR or STTR program shall include provisions setting forth the respective rights of the United States and the small business concern with respect to intellectual property rights and with respect to any right to carry out follow-on research.” *See* 15 U.S.C. § 638(r)(3) (2012). Lite Machines’ SBIR contracts incorporated the standard Patents Rights clause. Appx382, Appx386.

As discussed above, if the invention of the ‘763 patent was made under Lite Machines’ SBIR contracts, the Government would have at least a license that would cover AeroVironment’s use of the ‘763 patent on the Mars Helicopter program. If, on the other hand, the invention of the ‘763 patent was *not* made under Lite Machines’ SBIR contracts, the fundamental premise of the Arltons’ SBIR argument is false. Either way, there is no conflict between the SBIR Statute and Section 1498, let alone an irreconcilable conflict that would require this Court to disregard Section 1498 entirely.

Further, even if the two statutes *did* conflict, a “basic tenet of statutory construction is that a specific statute takes precedence over a more general one.” *PDS Consultants*, 907 F.3d at 1358 (collecting cases). As the more specific statute in the context of patent infringement, Section 1498 would prevail.

Finally, even if the Court were inclined to weigh allegedly competing Government policies, Appellants' argument that this balance tips against Section 1498's broad immunity is meritless. In *Advanced Software*, the plaintiff argued that the Federal Reserve Banks' accused acts were not "for the Government" because a federal statute, 12 U.S.C. § 391, "provides that the Reserve Banks serve as fiscal agents for the Treasury only for specified limited purposes, and that this statute does not grant the Reserve Banks power to enter procurement contracts on behalf of the Treasury." *Advanced Software Design Corp. v. Federal Reserve Bank of St. Louis*, 583 F.3d 1371, 1379 (Fed. Cir. 2009). This Court considered this argument irrelevant, stating that the Court "need not resolve this issue, for an agency relationship need not exist in order for § 1498(a) to apply." *Id.* (holding that "the Reserve Banks acted 'for the Government' when they contracted to adopt technology designed to detect fraudulent Treasury checks."). In other words, this Court refused to analyze whether the challenged actions were consistent with a separate federal statute because the scope of Section 1498 does not require such inquiry.

The Arltons' argument that the Government had no authority to consent to infringement of the Arltons' patent because of the SBIR Statute is wrong. Section 1498 codifies the Government's eminent domain powers as applied to patent rights. *See Zoltek Corp.*, 672 F.3d at 1320 ("Because [S]ection 1498 is an eminent domain

statute, the Government has consented thereunder only to be sued for its taking of a patent license.”). Thus, even if the policies underlying the SBIR Statute and Section 1498 conflicted with each other, Appellants offer no authority for the proposition that a policy issued by the Small Business Administration nullifies the Government’s eminent domain powers. Section 1498 applies here.

D. Section 1498 Covers AeroVironment’s Manufacture and Use of Terry.

1. *The Arltons Did Not Carry Their Burden to Show Substantial Commercial Use of Terry.*

The Arltons’ Complaint accuses only Ingenuity of infringement. Appx95-104. As discussed above, the District Court correctly granted summary judgment holding that AeroVironment’s work on Ingenuity was immunized by Section 1498.

After AeroVironment introduced Terry, an Earth-bound stand-in for Ingenuity, the District Court reopened the case to allow the Arltons to take limited discovery into whether AeroVironment offers to sell, sells, or uses Terry commercially. Appx21. In reopening the case, the District Court placed the burden of “show[ing] that Defendant sold or offered to sell these helicopters commercially, or otherwise used them commercially in a substantial way” squarely on the Arltons. Appx21.

There is no dispute that AeroVironment is not selling Terry, offering Terry for sale, or making substantial commercial use of Terry. Appx1415-1416. Thus,

the Arltons failed to carry their burden and the District Court correctly reentered summary judgment.

2. ***De Minimis Non-Governmental Use of Terry Does Not Defeat AeroVironment's Immunity Under Section 1498.***

The District Court held that AeroVironment's activities involving Terry were either work on Ingenuity, non-actionable, or *de minimis* non-governmental uses that did not take Terry outside the scope of Section 1498. Appx27-299. This was correct.

As a threshold matter, the District Court correctly found that many of the activities cited by the Arltons are not even "uses" under the Patent Act. Appx29. To the extent any of AeroVironment's allegedly infringing activities are "uses" within the meaning of the Patent Act, however, they are subject to the *de minimis* exception.

Citing *Embrex, Inc. v. Service Engineering Corp.*, 216 F.3d 1343 (Fed. Cir. 2000), the Arltons argue that the "de minimis use doctrine is exceedingly narrow." Op. Br. at 43-47. This argument is flawed because it conflates the *de minimis* exception to infringement with the scope of immunity under Section 1498. *Embrex* concerns whether a particular activity is an act of infringement under 35 U.S.C. § 271, whereas Section 1498 assumes infringement. *See* 28 U.S.C. § 1498(a). Thus, the question under Section 1498 is whether the Government has ***assumed liability*** for the alleged infringement, including any *de minimis* non-governmental uses, not

whether the accused acts are acts of infringement under the Patent Act in the first instance.

This Court consistently holds that “[t]he coverage of § 1498 should be broad so as not to limit the Government's freedom in procurement by considerations of private patent infringement.” *TVI Energy*, 806 F.2d at 1060. Applying that principle, the Court held that infringing tests conducted prior to the award of a Government contract were still immunized by Section 1498. *Id.* The Court reasoned that “[t]o limit the scope of § 1498 only to instances where the Government requires by specification that a supplier infringe another’s patent would defeat the Congressional intent to allow the Government to procure whatever it wished regardless of possible patent infringement.” *Id.*

The same logic applies here. AeroVironment built Terry *at JPL’s suggestion* to develop technology that JPL anticipated would be needed on future Mars exploration projects. Appx990-991; *see also* Appx1035 (describing “working with the team at JPL to flesh out a second generation Mars helicopter based heavily on Ingenuity,” which involved modifying the “Ingenuity clone (Terry) with an arm and wheels to demo the [concept of operations] in person at JPL”).). In developing Terry, AeroVironment used independent research and development IR&D funds, which can be recovered from the Government as an allowable indirect expense on

Government contracts.⁷ See Appx990-991; FAR 31.205-18; Appx1327. JPL ultimately contracted with AeroVironment to use Terry in support of the Mars Helicopter program under subcontracts that included the same authorization and consent clause discussed above. Appx1030-1034, Appx1931 (describing JPL’s use of Terry “to support ongoing acoustic investigations of Ingenuity on the surface of Mars, with the ground-truth data” under AeroVironment’s existing JPL subcontracts).

Terry is a textbook example of how precontracting activity supports the Government’s ability to procure the technology it needs by leveraging industry’s capabilities. As such, the District Court’s conclusion that Terry falls within the ambit of Section 1498 is correct; to hold otherwise would drastically limit the ability of contractors to demonstrate technological capabilities for future procurements, contrary to Congressional intent and this Court’s reasoning in *TVI Energy*.

Nor is there authority for Appellants’ contention that limited non-governmental uses provide an end-run around Section 1498’s broad immunity. This Court has long held that “it is not necessary for the Government to be the sole

⁷ IR&D expenses are allocable to the Government because the Government recognizes that IR&D efforts lead to the development of next-generation technologies to be sold to the Government for Government use. *ATK Thiokol, Inc. v. United States*, 598 F.3d 1329, 1336 (Fed. Cir. 2010).

beneficiary” for Section 1498 immunity to apply. *See Severson*, 477 F.3d at 1365-66; *see also IRIS Corp. v. Japan Airlines Corp.*, 769 F.3d 1359, 1362 (Fed. Cir. 2014). The remedy provided by Section 1498 is both “*exclusive and comprehensive*,” *Richmond Screw*, 275 U.S. at 343-44 (emphasis added), and the Court has recognized that allowing a part of a case covered by Section 1498 to remain “even if the core of the case...had to be dismissed” could “raise new problems under 28 U.S.C. § 1500.” *Astornet Techs.*, 802 F.3d at 1278. Allowing this action to go forward in the District Court would raise these very problems, as the Arltons and Lite Machines “have sought to bring claims against the Government for the Mars Helicopter’s infringement of U.S. Patent No. 8,042,763B2 (“the ’763 patent”))” in a separately-filed COFC case. Op. Br. at 1.

Consistent with this reasoning, numerous district courts have held that non-governmental uses, including appearances at trade shows and other marketing efforts, do not defeat Section 1498 immunity, provided there have not been any sales to non-governmental buyers. For example, in *Saint-Gobain*, even though nothing “indicate[d] that the [G]overnment [had] issued a formal solicitation or bidding process, the [G]overnment had indicated, and defendants knew of, its interest in acquiring [the alleged infringing] sapphire sheets,” the court held that “Section 1498 also protects the research and development activities that defendants undertook in order to develop a process by which they could develop those sheets.” *Saint-Gobain*

Ceramics & Plastics, Inc. v. II-VI Inc., 369 F. Supp. 3d 963, 979, 982-83 (C.D. Cal. 2019). The court emphasized that “the same policy rationales that underscored the appropriateness of applying Section 1498 in pre-bidding and solicitation contexts” also applied in that case, because “[r]equiring a [G]overnment contractor to receive a purchase order with the necessary authorization and consent clauses before even beginning the initial design and development work would impair the efficiency and quality of the current contracting system.” *Id.* at 979 (citing *Raymond Eng’g Inc. v. Miltope Corp.*, No. 85 Civ. 2685 (RWS), 1986 WL 488, at *3 (S.D.N.Y. May 23, 1986)); *see also BAE Sys. Info. & Elec. Sys. Integration Inc. v. Aeroflex Inc.*, No. 09-cv-769, 2011 WL 3474344, at *12 (D. Del. Aug. 2, 2011) (“The same logic applies with equal force to pre-bidding activity, particularly when, as here, the product is later subject to G]overnment bidding. The [G]overnment clearly has a national interest in achieving the best, most advanced form of IRCM technology; moreover, having defense contractors compete for bids enables the [G]overnment to procure the best defense systems at a lower price.”).

In addition, district courts uniformly hold that potential future non-Government sales are insufficient to strip a contractor of Section 1498 immunity. *See, e.g., id.* (upholding Section 1498 defense where contractor submitted a proposal to a non-Governmental customer, but did not ultimately sell the patented product, on the basis that “[w]here no sales have occurred, speculation about future non-US

[G]overnment sales are just that: speculation.”); *Raymond Eng’g, Inc.*, 1986 WL 488, at *5 (display “at two trade shows for military hardware which are open to the public and attended by representatives of foreign countries” does not amount to private, commercial usage of the item to overcome the Section 1498 defense).

There have been no non-Governmental sales of or offers to sell Terry to negate AeroVironment’s Section 1498 immunity. Thus, AeroVironment’s consideration of a meeting with Elon Musk, who “might want [AeroVironment] to do something for SpaceX regarding helicopters” at some point in the future, Appx1193-1194, does not overcome AeroVironment’s Section 1498 defense. Indeed, because the meeting never happened, Appx1403, there was not even a “use” of Terry within the meaning of the Patent Act to excuse as *de minimis*.

The same is true of AeroVironment’s cursory discussions with Impulse Space. AeroVironment never offered to sell Impulse Space any products; any potential business relationship withered on the vine when the parties uncovered a conflict of interest. Appx1413-1414 (“I think there was a Zoom meeting, and I think that was the end of it because of the conflict.”).

Nor does AeroVironment’s presentation to UP.Partners preclude Section 1498 immunity. Despite the demonstration of various aircraft, including Terry, AeroVironment never intended to sell Terry (or any other aircraft) to UP.Partners, and UP.Partners never proposed investing in AeroVironment, let alone actually

invested. Appx1404, Appx1416; *see also* Appx1367-1368 (“UP Partners has not made, or proposed to make, any investment in AeroVironment.”).

The Arltons point to Matt Keennon’s testimony that his primary purpose in building Terry “was to have a marketing visual aid that we could use to promote AeroVironment’s capabilities, you know, technical capabilities” and “that Terry might become a ‘good product of some sort’” Op. Br. at 19, 50 (quoting Appx1454). Appellants ignore, however, that Keennon contemplated this potential product *for the Government*, such as “potential stealth UAV applications.” Appx1327. They also omit Keennon’s prediction that there could “be some aspect of Ingenuity’s operations on Mars that we could test on Earth, and that would be possibly another good reason to have [Terry].” Appx1454. This is *exactly* what happened – JPL contracted to use Terry to better analyze acoustic data received from Ingenuity. Appx1327, Appx1030-1034.

Although they challenge the applicability of the *de minimis* exception to these activities, the Arltons have not proffered any case where a Government contractor’s Section 1498 defense was rejected without evidence of actual non-Governmental sales. The District Court’s extension of summary judgment to Terry was therefore appropriate.

II. The District Court Did Not Abuse Its Discretion In Denying the Arltons' Belated Motion To Amend.

A party seeking to amend the pleadings after the deadline set by the Scheduling Order must satisfy the more stringent “good cause” standard set forth in Rule 16(b)(4), not the standard set forth in Rule 15. Fed. R. Civ. P. 16(b); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-09 (9th Cir. 1992) (Rule 16(b)’s “good cause” standard applies when a plaintiff seeks to amend a complaint after the scheduling order deadline). Appellants concede that the primary determinant of good cause is the “diligence of the party seeking the amendment.” *Id.* at 609; *see also* Op. Br. at 53. Appellants were not diligent.

The Arltons filed their Complaint on August 17, 2020. Appx104. The District Court’s Scheduling Order adopted Appellants’ suggested deadline of February 12, 2021, to add parties and amend the pleadings in the case. Appx130. After that deadline, AeroVironment moved for summary judgment on its Section 1498 defense. Appx131.

Faced with impending summary judgment on their patent claims, the Arltons sought to add new claims and parties. Appx610. This was too late, and the Arltons failed to show good cause for their delay. Indeed, the Arltons admitted they had discovered their trade secret claims “by or about January 31, 2021,” Op. Br. at 59, *but nevertheless chose to ignore the deadline.* Appx618; *see also* Appx629.

The Arltons attempt to excuse this lack of diligence by arguing that the deadline for filing a motion to amend *without seeking leave of Court* had lapsed, Op. Br. at 58, but the deadline to amend pleadings did not lapse until February 12, 2021. *See* Appx130. The fact that the proposed amendment required a motion in no way excuses the Arltons' decision not to file a motion before the deadline for doing so had passed.

Appellants also attempt to shift blame to the timing of AeroVironment's production of Highly Confidential documents. The record belies this accusation. Appellants admitted below that, from the very beginning of the case, they "suspected that the Mars Helicopter Ingenuity incorporated trade secret information from the Arltons." Appx616. They also admitted that AeroVironment's use of their alleged trade secrets was "reflected in public statements regarding the Mars Helicopter Ingenuity." *See* Appx618. The timing and content of AeroVironment's document production is a red herring.

Moreover, for all their excuses about the timeline of their motion for leave to amend, Appellants still waited until March 22, 2021—more than a month after the deadline had passed—to file their motion. Appx612. This is the antithesis of diligence.

Under the circumstances, Appellants failed to show good cause and the District Court did not abuse its discretion in denying them leave to amend.

III. The District Court Abused Its Discretion In Declining To Award Fees.

In enacting Section 1498, “Congress took away the [G]overnment contractor’s liability for patent infringement under the Patent Act and placed it on the Government” in order “to promote the smooth procurement of products and services from [G]overnment contractors, without the contractors having to face the expense or distraction posed by infringement suits.” *Zoltek Corp. v. United States*, 85 Fed. Cl. 409, 416-18 (2009), *rev’d on other grounds*, 672 F.3d 1309; *see also TVI Energy*, 806 F.2d at 1060 (“[T]he coverage of § 1498 should be broad so as not to limit the Government’s freedom in procurement by considerations of private patent infringement.”). “In other words, § 1498 was enacted to give the Government the freedom to contract with whomever it chooses in order to procure goods or services while providing immunity to those contractors.” Appx11.

Thus, when a Government contractor uses or manufactures a patented invention “for the United States,” the patentee’s sole remedy is through action against the United States at the COFC. 28 U.S.C. § 1498(a). The patentee cannot recover from the infringing contractor under the Patent Act because Section 1498 “relieve[s] the contractor *entirely from liability of every kind for the infringement of patents in manufacturing anything for the [G]overnment.*” *Richmond Screw* 275 U.S. at 343. In fact, a contractor’s immunity under Section 1498(a) is so broad that it not only shields the contractor from traditional patent infringement liability,

but also “*relieve[s] private Government contractors from expensive litigation with patentees.*” *Astornet Techs.*, 802 F.3d at 1277 (quoting *TVI Energy*, 806 F.2d at 1059-60).

The expensive litigation that Section 1498 is designed to avoid ensued when the Arltons filed this suit and refused, against all reason, to dismiss it in favor of the statutorily-prescribed remedy at the COFC. Had the Arltons undertaken even a modicum of pre-suit investigation, they would have recognized that Section 1498 barred their infringement claim against AeroVironment and that they were required to seek relief at the COFC instead.

As discussed above, the publicly available JPL Operating Contract contains a broad authorization and consent clause that covers “*all* use and manufacture of *any* invention described in and covered by a United States patent in the performance of this contract *or any subcontract at any tier.*” 48 C.F.R. § 52.227-1(a), Alternate I; Appx139, Appx165. That the Arltons could not pursue patent infringement claims against AeroVironment in District Court was therefore clear to anyone who bothered to look. That Appellants did not bother to look is part of what makes this case exceptional under 35 U.S.C. § 285: Absent an award of attorneys’ fees and costs to deter frivolous patent infringement claims against Government contractors, patentees would be empowered to run roughshod over the policy animating Section

1498 by filing private patent infringement lawsuits against Government contractors, disincentivizing them to work with the Government in the first instance.

Moreover, the Arltons *never* acknowledged their error, despite *multiple* warning signs. Indeed, they pressed on even *after* the United States confirmed the accuracy of AeroVironment's position in its Statement of Interest.

In short, the Arltons refused to accept the remedy Congress provided for these circumstances, which subverted the intent of Section 1498: Instead of being *relieved* of the expense of patent litigation as Congress intended, AeroVironment *incurred* hundreds of thousands of dollars in legal fees to defend against the Arltons' meritless claim. The Arltons, not AeroVironment, should bear the consequences of their strategy. *See, e.g., Universal Elecs., Inc. v. Universal Remote Control, Inc.*, 130 F. Supp. 3d 1331, 1334 (C.D. Cal. 2015), *aff'd*, 669 F. App'x 575 (Fed. Cir. 2016) ("One purpose of [S]ection 285 is to deter bad faith litigation by imposing the cost of a bad decision on the decision-maker.").

This Court should reverse the District Court and award AeroVironment its reasonable attorneys' fees and costs incurred in defending this action.

A. 35 U.S.C. § 285 Permits an Award of Fees to Deter Frivolous Patent Litigation and to Compensate Litigants Harmed by Such Litigation.

35 U.S.C. § 285 permits a court to award "reasonable attorney fees to the prevailing party" in "exceptional cases." Here, the District Court designated

AeroVironment the prevailing party, Appx32, so the only question is whether this case is “exceptional.”

To be “exceptional,” a case need only “stand[] out from others with respect to the substantive strength of a party’s litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.” *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014). Factors that a district court can consider include “frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” *Id.* at 554 n.6 (internal quotations omitted).

“Congress’ policy objective in enacting § 285 was two-fold: (1) to provide a deterrent to frivolous or unnecessary patent litigation, and (2) to serve a compensatory purpose for parties injured by such litigation.” *Kilopass Tech., Inc. v. Sidense Corp.*, 82 F. Supp. 3d 1154, 1165 (N.D. Cal. 2015) (citing *Raylon, LLC v. Complus Data Innovations, Inc.*, 700 F.3d 1361, 1372-73 (Fed. Cir. 2012)). Thus, when “it is the ‘totality of the circumstances,’ and not just discrete acts of litigation conduct, that justify the court’s award of fees[,]” the “dual goal of deterrence and restitution” is best served by an award of “all reasonable attorneys’ fees arising out of the patent-related litigation,” not just those incurred from specific instances of

exceptional conduct. *Id.* at 1166-67 (quoting *Homeland Housewares, LLC v. Sorensen Rsch. & Dev. Tr.*, 581 F. App'x. 877, 881 (Fed. Cir. 2014)).

Courts may also “award fees as part of their inherent power to sanction a party for bad faith conduct.” *Nat'l Merch. Ctr., Inc. v. MediaNet Grp. Techs., Inc.*, 893 F. Supp. 2d 1054, 1057 (C.D. Cal. 2012).

B. AeroVironment is Entitled to its Reasonable Attorneys' Fees Under 35 U.S.C. § 285 and/or the Court's Inherent Sanction Power.

When the facts of the case show that an award of fees is appropriate, the court *must* award them, lest it abuse its discretion. *See AdjustaCam*, 861 F.3d at 1359 (“We recognize the deference owed to district courts in deciding fees motions. Deference, however, is not absolute. When a district court bases its decision on a clearly erroneous view of the evidence, as it did here, the court abuses its discretion in denying fees.”) (internal citations omitted); *Rothschild Connected Devices Innovations, LLC v. Guardian Prot. Servs., Inc.*, 858 F.3d 1383 (Fed. Cir. 2017) (reversing decision not to award fees); *Cf. Tresona Multimedia, LLC v. Burbank High Sch. Vocal Music Ass'n*, 953 F.3d 638, 653-54 (9th Cir. 2020) (reversing denial of fees where “Defendants prevailed across the board in this action in the district court and won a ruling on their fair use defense on appeal” and noting that “awarding fees encourages ‘[t]he copyright holder with no reasonable infringement claim...not to bring suit in the first instance.’”) (quoting *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 205 (2016)).

This case is exceptional, and justifies an award of fees, because its very existence defies the broad immunity and relief from patent infringement litigation expenses that Section 1498 grants to Government contractors. The Arltons' Complaint accused AeroVironment of patent infringement in the performance of a Government contract that includes an express authorization and consent clause. Appx95-104. Section 1498 does not permit a patentee to recover for such claims. And because the JPL Operating Contract is publicly available, the Arltons should have known as much before filing this suit. In short, this litigation should never have been.

After the Arltons' failure to confirm, pre-suit, that they were suing the correct defendant in the correct court, they rejected multiple opportunities to fix their mistake. They had the opportunity to dismiss when AeroVironment first laid out its Section 1498 defense, Appx872, when AeroVironment produced the Ingenuity Subcontracts, Appx135, and again when the Government filed its Statement of Interest, Appx172. Instead, they repeatedly doubled-down on their meritless patent infringement claim—including by questioning the veracity of the Government's sworn declaration, Appx229, Appx751-752, and filing a Freedom of Information Act request to obtain the discovery from NASA that the District Court had determined was irrelevant. These actions unnecessarily multiplied not just AeroVironment's expenses, but also the Government's.

As discussed above, the Arltons never advanced any credible argument that Section 1498 does not cover AeroVironment's accused conduct. Every argument they advanced was either wholly unsupported (*e.g.*, their argument "that [G]overnment contractors are prohibited from discussing work they did for the [G]overnment where the work itself is subject to § 1498," Appx28) or previously rejected (*e.g.*, their argument that the SBIR Statute mandated award to Lite Machines).

This case is exceptional because the readily-apparent and indisputable applicability of Section 1498 made the Arltons' claims frivolous from the start. The Arltons' ensuing "damn the torpedoes" attitude underscores that this case is also exceptional because of the unreasonable manner in which Appellants litigated. *Gabriel Techs. Corp. v. Qualcomm Inc.*, 560 F. App'x 966, 968 (Fed. Cir. 2014) (affirming award of attorneys' fees under § 285 pre-*Octane Fitness* where "plaintiffs were well aware that they lacked the requisite evidence to support their claims, but opted to pursue their claims nonetheless") (internal citation and quotation omitted); *MarcTec, LLC v. Johnson & Johnson*, 664 F.3d 907, 917, 920-21 (Fed. Cir. 2012) (affirming district court's holding that case was exceptional where the patentee acted in "bad faith in bringing and pressing this suit when it had no basis for asserting infringement" and for patentee's misrepresentations to the court); *see also Astornet Techs., Inc. v. BAE Sys., Inc.*, 201 F. Supp. 3d 721, 731 (D. Md. 2016) ("Astornet's

continuation of this litigation became clearly unreasonable, at the latest, when it failed to address the problems 28 U.S.C. § 1498 posed to its claim in its Opposition to BAE's Motion to Dismiss in April 2014.”).

The Arltons cannot reasonably claim that they were unaware of the lack of merit of this litigation. They simply chose to ignore repeated warning signs and press on with the case despite being offered numerous opportunities to walk away. Among other unreasonable actions, the Arltons:

- Filed this action despite the JPL Operating Contract, which establishes that infringing activities undertaken by a subcontractor to JPL are done for the Government and with the Government's authorization and consent, being publicly available. Appx138, Appx165.
- Maintained this action after AeroVironment produced the Ingenuity Subcontracts, confirming that the Government had authorized and consented to all of AeroVironment's allegedly infringing conduct. Appx135, Appx142, Appx150, Appx157, Appx166-167, Appx170, Appx171.
- Maintained this action after the Government filed its Statement of Interest reiterating that the Government had assumed all patent infringement liability for AeroVironment's work on the Mars Helicopter program. Appx172.

- Opposed AeroVironment's Motion for Summary Judgment with a previously-undisclosed and frivolous theory that the SBIR Statute forbids application of Section 1498, offering no legal authority for this argument in view of contrary Federal Circuit and COFC precedents of which they knew or should have known. Appx315-339.
- Failed to provide and address the District Court with these directly on-point, adverse precedents in their Opposition. Appx680-684.
- Filed an emergency *ex parte* application to file a sur-reply to AeroVironment's Motion for Summary Judgment to justify their decision not to cite these precedents in their Opposition, which unreasonably and unnecessarily multiplied the briefing in connection with AeroVironment's summary judgment motion. *See* Pls.' Ex Parte Appl. for Leave to File Sur-Reply, *Arlton v. AeroVironment, Inc.*, No. 2:20cv7438 (C.D. Cal. Mar. 17, 2021), ECF No. 42.
- Offered no credible basis to excuse their failure to cite these precedents in their Opposition, which also unreasonably and unnecessarily multiplied the briefing in connection with AeroVironment's summary judgment motion. Appx680-684.
- Filed a motion seeking leave to amend their Complaint well after the deadline in the scheduling order, without good cause, and after

AeroVironment's Motion for Summary Judgment was fully briefed, thus further multiplying the briefing required. Appx610.

- Filed an emergency *ex parte* application to continue the hearing on AeroVironment's Motion for Summary Judgment and needlessly delay resolution of this case in light of their untimely motion to amend, despite conceding that the motion to amend would not affect the determination of AeroVironment's Motion for Summary Judgment. Pls.' Ex Parte Appl. to Continue Hr'g on Def.'s Mot. for Summ. J. at 5, *Arlton v. AeroVironment, Inc.*, No. 2:20cv7438 (C.D. Cal. Mar. 23, 2021), ECF No. 49.
- Filed a Renewed Opposition to AeroVironment's Motion for Summary Judgment that presented no colorable argument for denial of re-entry of summary judgment. Appx1421.

The Arltons' knowing decision to persist in litigating a case that was so plainly meritless, and to do so in an objectively unreasonable manner, is not just exceptional, it constitutes subjective bad faith. Either characterization justifies an award of fees. *See, e.g., Salvin v. Am. Nat. Ins. Co.*, 281 F. App'x 222, 226 (4th Cir. 2008) (finding bad faith where the plaintiff fails to "dismiss the case once its lack of merit became evident"). Indeed, an award of fees is particularly justified here, given Section

1498's express purpose of "reliev[ing] private Government contractors from expensive litigation with patentees." *Astornet Techs.*, 802 F.3d at 1277.

By unreasonably pressing forward with this litigation at every turn, the Arltons forced AeroVironment to expend substantial resources litigating over where the Arltons' patent infringement claim belonged *even after the Arltons presented the same patent infringement claims to the COFC*. As the District Court noted, "[u]nderlying much of the Arltons' argument is the mistaken belief that the Arltons would have no recourse for Defendant's alleged infringement if § 1498 applies." Appx13. Yet, "Section 1498 provides that 'the owner's remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture.'" Appx13. The Arltons' counsel admitted she was unaware of the remedies available in the COFC. *See* Appx754-755 ("[I]f you look at the case law on this in terms of what it means, what the remedies are to the – to AeroVironment, the last case that I looked at said there would be no remedies under the patent statute at all if you go into the Court of Claims.")). This is inexcusable. Having been alerted to Section 1498 at the outset, it was incumbent on counsel to familiarize themselves with at least the basics of Section 1498 jurisprudence. The information is not difficult to find: The COFC maintains a primer on Section 1498 that explains that a patent owner suing the Government under Section 1498 is entitled to "reasonable and entire

compensation” and “that the determination of a reasonable royalty is the preferred method of valuation, applying the same case law as in district court patent infringement actions.”⁸

Likewise, the Arltons continued to press for discovery from the Government concerning whether the Government had consented to infringement, *even after the Government filed a Statement of Interest confirming its consent*. Appx752 (Court: “You say that there should be discovery to determine what? Whether they’re lying or what?”).) During argument, the District Court asked the sensible question of whether the timing of the Government’s consent matters, and the Arltons’ counsel responded that “You know, I haven’t researched that from a legal matter.” Appx752.

Appellants’ lack of diligence into the viability of their claims is inexcusable. At minimum, the Arltons’ counsel should have familiarized themselves with the authorities AeroVironment cited in its reply brief holding that the timing of the Government’s authorization and consent *does not* matter, rather than continuing to pursue this litigation. Appx524, Appx529 (citing *Hughes Aircraft Co. v. United*

⁸ COFC, *Intellectual Property Suits in the United States Court of Federal Claims* (Oct. 4, 2017), available at <https://www.uscfc.uscourts.gov/node/2927#:~:text=United%20States%2C%20the%20Court%20of,which%20fall%20short%20of%20direct.>

States, 534 F.2d 889, 901 (Ct. Cl. 1976); *Advanced Software Design Corp. v. Fed. Rsrv. Bank*, 583 F.3d 1371, 1377-78 (Fed. Cir. 2009)).

Put simply, this case is exceptional both because Appellants' claims were meritless and because of the unreasonable manner in which Appellants pursued those claims.

C. The District Court's Decision to Deny an Award of Fees Was an Abuse of Discretion.

Despite the discretion in making fee awards, "an appellate court may correct a district court's legal or factual error." *AdjustaCam*, 861 F.3d at 1358-59 (citing *Highmark Inc. v. Health Mgmt. Sys., Inc.*, 597 U.S. 559, 563 n.2 (2014)). "A district court abuses its discretion when its ruling rests on an erroneous legal conclusion or on a clearly erroneous assessment of the evidence." *Id.* The court also abuses its discretion when it makes "a clear error of judgment in weighing relevant factors." *Bayer CropScience AG v. Dow AgroSciences LLC*, 851 F.3d 1302, 1306 (Fed. Cir. 2017) (quoting *Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, 150 F.3d 1374, 1377 (Fed. Cir. 1998)). Thus, when the facts of the case show that an award of fees is appropriate, the court *must* award them; to do otherwise is an abuse of discretion. *See Rothschild Connected Devices Innovations*, 858 F.3d 1383 (reversing decision not to award fees); *Cf. Tresona Multimedia*, 953 F.3d at 653-54 (reversing denial of fees where "Defendants prevailed across the board in this action in the district court and won a ruling on their fair use defense on appeal" and noting

that “awarding fees encourages ‘[t]he copyright holder with no reasonable infringement claim . . . not to bring suit in the first instance.’”) (quoting *Kirtsaeng*, 579 U.S. at 205).

As described above, the record amply establishes that this is an exceptional case. The District Court’s conclusion otherwise is an abuse of discretion.

As an initial matter, the District Court failed to “consider[] the totality of the circumstances.” *Octane Fitness*, 572 U.S. at 554; *see also Homeland Housewares*, 581 F. App’x at 881 (“[I]t is the ‘totality of the circumstances,’ and not just discrete acts of litigation conduct, that justify the court’s award of fees.”). Instead, the District Court’s decision denying AeroVironment its attorneys’ fees relies upon findings that *discrete instances of Appellants’ conduct* were not exceptional. This is an abuse of discretion.

Even if it was proper for the District Court to deny AeroVironment’s fees motion on the basis of individual circumstances, however, none of three points the District Court made to justify its decision survives scrutiny.

First, the District Court reasoned that “Defendant’s argument boils down to an assertion that because it believed all along it would prevail and it did prevail, the case is exceptional.” Appx37. This is incorrect. AeroVironment did not argue that this case is exceptional because AeroVironment expected to, and did, win. Rather, AeroVironment argued that this case is exceptional because the law and facts were

so clear that the Arltons reasonably should have known the only possible outcome was for AeroVironment to win, but persisted nonetheless.

As explained above, even before filing suit, the Arltons should have recognized that AeroVironment's work on Ingenuity was covered by Section 1498. The JPL Operating Contract, including its authorization and consent clause, is publicly available. Appx138, Appx165. After the Arltons filed suit, AeroVironment provided the Ingenuity Subcontracts and the relevant caselaw to the Arltons, Appx135, Appx872-873, and the Government reinforced the applicability of Section 1498 with its Statement of Interest, Appx172. Yet, the Arltons continued to litigate anyway, despite admitting that their patent rights "were taken by the Government." Op. Br. at 2.

Appellants' brief reveals why they steadfastly refuse to accept their exclusive statutory remedy: They do not want "reasonable and entire compensation" for a taking, but rather credit for AeroVironment's achievements. *Id.* at 52 n.16 ("The Arltons have the right to set the historical record straight . . . credit is due the Arlton brothers, not AeroVironment."). This is why they filed a meritless suit against AeroVironment, instead of at the COFC, and why they pursued that suit against all reason in the face of overwhelming adverse precedent. It also reinforces why this case is exceptional: Not only is the remedy Appellants seek – public recognition for AeroVironment's work under the Ingenuity Subcontracts – beyond the exclusive

remedy of Section 1498, *it is not even a remedy for patent infringement generally.*

No reasonable litigant could expect to “win” such relief, much less “win” it where the alleged infringement was Government-sanctioned.

Second, the District Court did not consider Appellants’ substantive positions frivolous because “plaintiffs distinguished prior caselaw about the Small Business Innovation Research Program because plaintiffs’ argument related to a new Phase III contract and whether in view of the SBIR program the [G]overnment could engage with multiple contractors on the same technology.” Appx37. As discussed in Section I.C, *supra*, however, the Arltons’ SBIR arguments are plainly frivolous, and had already been rejected wholesale by the COFC applying this Court’s precedents. Most telling is that the Arltons intentionally concealed the COFC’s decision from the District Court, falsely claiming it was “classified.” Appx1060.

In its entirety, the record establishes “this case as standing out from others with respect to the substantive strength of [the Arltons’] litigating position.” *AdjustaCam*, 861 F.3d at 1360. Even if the Arltons’ initial decision to file this case could be excused as merely “weak,” there is no excuse for continuing to litigate after the Government filed its Statement of Interest, which reinforced that Appellants’ claims were objectively “baseless.” *See id.* (“Where AdjustaCam may have filed a weak infringement lawsuit, accusing Newegg’s products of infringing the ‘343

patent, AdjustaCam’s suit became baseless after the district court’s Markman order.”).

Likewise, the District Court clearly erred by failing to consider the Arltons’ “willful ignorance” of the case law interpreting Section 1498 and the remedies available in the COFC when evaluating Appellants’ substantive positions. *See* Appx752; *Rothschild Connected Devices Innovations*, 858 F.3d at 1388 (holding that the District Court clearly erred by failing to consider a party’s “willful ignorance of the prior art.”). In short, the “district court’s clearly erroneous findings about the substantive strength of [the Arltons’] case independently support reversal.” *AdjustaCam*, 861 F.3d at 1360.

Finally, the District Court found that the Arltons’ renewed opposition to summary judgment was not frivolous. The District Court’s basis for this conclusion is that, although the Arltons made baseless arguments, “the Court does not believe they did so in bad faith.” Appx38. Bad faith is not required for a case to be exceptional, however; in any event, Appellants’ reckless assertion of baseless arguments requires an inference of bad faith. *Eltech Sys. Corp. v. PPG Indus., Inc.*, 903 F.2d 805, 811 (Fed. Cir. 1990) (“Where, as here, the patentee is manifestly unreasonable in assessing infringement, while continuing to assert infringement in court, an inference is proper of bad faith, whether grounded in or denominated wrongful intent, recklessness, or gross negligence.”).

Considering the “totality of the circumstances,” the District Court abused its discretion when it denied AeroVironment’s motion for attorneys’ fees. This Court should reverse and direct the District Court to award fees to AeroVironment.

D. Amount of Fees

Because the District Court declined to award fees, it did not determine the amount of fees. AeroVironment requested an award of attorneys’ fees and costs of \$820,395.64. Appx1629. In opposing AeroVironment’s original Motion for Attorneys’ Fees, the Arltons offered only a general objection that “AeroVironment’s fee award under Section 285 is also unreasonable on the whole.” Appx948. They did not challenge the hourly rates or the hours spent on specific tasks as unreasonable or excessive. Appellants have therefore waived any challenge to the lodestar calculation.

Accordingly, if the Court determines that the denial of AeroVironment’s fees motion should be reversed, it should direct the District Court to enter an award in the amount requested by AeroVironment.

CONCLUSION

For the foregoing reasons, the decisions of the District Court to grant summary judgment and deny the Arltons’ motion to amend should be affirmed, and the decision to deny fees should be reversed.

Dated: September 17, 2024

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**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

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Case Number: 2021-2049; 2024-1084; 2024-1159

Short Case Caption: Arlton v. Aerovironment, Inc.

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**UNITED STATES COURT OF APPEALS
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